IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 8387 OF 2003
With
SPECIAL CIVIL APPLICATION NO. 9865 OF 2003
With
SPECIAL CIVIL APPLICATION NO. 8391 OF 2003
With
SPECIAL CIVIL APPLICATION NO. 8388 OF 2003
With
SPECIAL CIVIL APPLICATION NO. 8389 OF 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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MESSRS GOPAL IRON & STEEL CO.
(GUJARAT) LTD. & ANR. - Petitioner(s)
Versus
UNION OF INDIA & ORS. - Respondent(s)

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Appearance :
MR. PARESH M. DAVE for Petitioner(s).
MR. PURVISH J. MALKAN for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 04/07/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

The parties are heard at length.

2. Special Civil Application No.8387 of 2003 [Gopal Iron & Steel Co. (Gujarat) Ltd. vs. Union of India], Special Civil Application No.9865 [Shree Steel Industries vs. Union of India] and Special Civil Application No.8391 [Shree Laxmi Steel Rolling Mills vs. Union of India] are the petitions by Steel Rolling or Re-rolling Mills challenging the *vires* of Rule-3 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 (“the Re-rolling Steel Rules” for short) brought into effect after exercise of the powers conferred upon the Central Government by Sub.section-(2) of Section-3A of the Central Excise Act, 1944 (“the Act” for short). Special Civil Application No.8388 of 2003 [Raghuvir Synthetics Ltd. vs. Union of India] and Special Civil Application No.8389 of 2003 [B. Santumal Textile Mills Pvt. Ltd. vs. Union of India] are the petitions by the Textile Industries, which are challenging the *vires* of Rule-3 of the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998

("the Hot Air Stenter Rules" for short), the Rules framed under Section-3A of the Act.

3. The first three petitioners are engaged in the business of re-rolling of steel, while the other two are engaged in the manufacture of synthetic/textile fabrics.

4. The learned Counsel for the petitioners firstly submits that Section-3A of the Central Excise and Salt Act, 1944 is *ultra vires* the Constitution, especially, Entry 84 of the Union List of the Seventh Schedule of the Constitution. The submission is that levy can be effected on the goods produced or manufactured by an industry and not on hypothetical basis or on some formula, which does not relate to manufacture or produce. He submits that Section-3A provides levy of the duty on the basis of the capacity of production and as such, it is bad. It is further submitted that the rules framed on the authority conferred under Section-3A of the Act, referred to above, are consequently bad and in case Section-3A is held to be constitutionally valid, Rule-3 of the Re-rolling Steel Rules and the Hot Air Stenter Rules are *ultra vires* Section-3A of the Act. On the other hand, the learned Counsel for the Revenue has submitted that Section-3A of the Act is not *ultra vires* the Constitution, it was

within the legislative competence and a fair understanding of the set of the Rules would show that proper formula has been given to come to the decision on the production capacity.

5. Entry-84 of the Union List of the Seventh Schedule reads as under :

> *"84. Duties of excise on tobacco and other goods manufactured or produced in India except-*
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> *(a) alcoholic liquors for human consumption;*
> *(b) opium, Indian hemp and other narcotic drugs and narcotics,*
> *but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."*

From a perusal of the Entry, it would be clear that duty of excise can be levied on tobacco and other goods manufactured or produced in India except certain articles to which Entry-84 is not available. True it is, that excise is leviable to the production or manufacture by the industry, but, that Entry is to be understood in its proper perspective.

6. Section-3A of the Act, the *vires* of which has

been challenged, reads as under :

> “Section 3A. ***Power of Central Government to charge Excise duty on the basis of capacity of production in respect of notified goods.***--
> (1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.
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> (2) Where a notification is issued under sub-section (1), the Central Government may, by rules, provide for determination of the annual capacity of production, or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced, by the Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory :
>
> Provided that where a factory producing notified goods is in operation only

during a part of the year, the production thereof shall be calculated on proportionate basis of the annual capacity of production.

(3) The duty of excise on notified goods shall be levied, at such rate as the Central Government may by notification in the Official Gazette specify, and collected in such manner as may be prescribed :

Provided that, where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfills such conditions as may be prescribed.

(4) Where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under sub-section (2), the Commissioner of Central Excise shall, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in sub-section (3).

(5) Where the Commissioner of Central Excise determines the actual production under sub-section (4), the amount of duty already

paid, if any, shall be adjusted against the duty so redetermined and if the duty already paid falls short of, or is in excess of, the duty so redetermined, the assessee shall pay the deficiency or be entitled to a refund, as the case may be.

(6) The provisions of this section shall not apply to goods produced or manufactured, -

(i) in a free trade zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and allowed to be sold in India.

Explanation 1.- For the removal of doubts, it is hereby clarified that for the purposes of section 3 of the Customs Tariff Act, 1975 (51 of 1975), the duty of excise leviable on the notified goods shall be deemed to be the duty of excise leviable on such goods under the First Schedule and the Second Schedule to the Central excise Tariff Act, 1985 (5 of 1986), read with any notification for the time being in force.

Explanation 2.- For the purposes of this section the expressions “free trade zone” and “hundred per cent export-oriented undertaking” shall have the meanings assigned to them in section 3.”

Section-3A, in fact, is a contra-indication to

Section-3 of the Act as it provides for different mode and manner of levy of the duty. Sub.section-(1) of Section-3A starts with a *non obstante* clause by saying that notwithstanding anything contained in section 3, the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, after opining that it has become necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and excise would be levied on such goods in accordance with the provisions of Section-3A.

6.1 Sub.section-(2) provides that when a notification is issued under Sub.section-(1), the Central Government may, by rules, provide for determination of the annual capacity of production or such factor or factors relevant to the annual capacity of production of the factory in which such goods are produced and such annual capacity of production shall be deemed to be the annual production of such goods by such factory. This exercise of fixing the annual capacity is to be undertaken by the Commissioner of the Central Excise.

6.2 According to Sub.section-(3), the duty of excise on notified goods shall be levied at such rate as the Central Government may by notification in the Official Gazette specify, and it may be collected in such a manner as may be prescribed.

The proviso appended to Sub.section-(3) provides that where a factory producing notified goods did not produce the notified goods during any continuous period of not less than seven days, duty calculated on a proportionate basis shall be abated in respect of such period if the manufacturer of such goods fulfills such conditions as may be prescribed.

6.3 Sub.section-(4) provides that where an assessee claims that the actual production of notified goods in his factory is lower than the production determined under Sub.section (2), he can apply to the Commissioner of Central Excise and the Commissioner, after giving an opportunity to the assessee to produce evidence in support of his claim, determine the actual production and redetermine the amount of duty payable by the assessee with reference to such actual production at the rate specified in Sub-section (3).

7. The learned Counsel for the petitioners submits that Sub.section-(2) of Section-3A runs contrary to Entry 84 of the Union List of the Seventh Schedule of the Constitution because it proposes to charge levy on hypothetical basis and not on the actual production.

8. The very same argument has been considered by the Supreme Court in the matter of ***Commissioner of Central Excise & Customs vs. Venus Castings (P) Ltd., 2000 (117) E.L.T. 273 (S.C.)***. There, the question was in relation to appreciation of Section-3A(4) *vis-a-vis* Rule 96ZO(3) of the Central Excise Rules, 1944. Though the question was that if the manufacturer or purchaser opts for the scheme provided under Rule-96ZO(3) whether he would be still entitled to claim benefits under Section-3A(4) of the Act or having opted for the scheme floated under Rule-96ZO(3), is debarred from exercising the option under Section-3A(4) and his right would stand closed. The Supreme Court considered the entire matter and observed that application of Section-3A(4) would stand excluded once Rule-96ZO(3) is opted for by the manufacturer. The Supreme Court also made observations that Section-3A(4) is a section which levies the duty on the production and the duty is relatable to the

production and not otherwise. Despite these observations made by the Supreme Court, the learned Counsel for the petitioners repeatedly contended that correctness, validity and constitutional validity of Section-3A(2) of the Act is required to be considered by this Court.

In paragraph-11 of the said judgement, the Supreme Court has observed as under :

> “.... However, in our opinion, all these decisions, either arising under the Income Tax Act in relation to special mode of collection of tax or excise duty on timber dealers or other enactments have no relevance. What can be seen is that the charge under the Section is clearly on production of the goods but the measure of tax is dependent on either actual production of goods or on some other basis. The incidence of tax is, therefore, on the production of goods. It cannot be said that collection of tax based on the annual furnace capacity is not relatable to the production of goods and does not carry the purpose of the Act. In holding whether a relevant rule to be *ultra vires* it becomes necessary to take into consideration the purpose of enactment as a whole, starting from the preamble to the last provision thereto. If the entire enactment is read as a whole indicates the purpose and that purpose is carried out by the rules, the same cannot be

stated to be *ultra vires* of the provisions of the enactment. .... “

These observations made by the Supreme Court are clear in terms when they say that Section-3A of the Excise Act is a mode of charging the duty in a different manner. The observations of the Supreme Court that the charge under the Section is clearly on production of the goods but the measure of the tax is dependent on either actual production of goods or on some other basis, which are to be understood in their true spirit and for the reasons for which those have been laid. Once the Supreme Court says that Section-3A proposes levy on actual production and not on hypothetical basis or otherwise, then, it cannot be said that the section is *ultra vires* the Constitution.

9. Section-3A (2) of the Central Excise Act provides for determination of the annual capacity and levy of the duty on such annual capacity. Sub.section-(2) of Section-3A in itself is not complete, certain rules are to be framed for determination of the capacity and Sub.section-(4) provides that if a manufacturer/producer proves to the satisfaction of the Commissioner that his production was less than the capacity, then, the duty

shall be redetermined and in case he has paid less, further levy would be recovered and in case, he has paid more, he would be entitled to refund. If such is the clear provision of law and there is no ambiguity in it, then, simply because challenge is thrown to the constitutional validity, the Court would not readily accept the argument. Even otherwise the Courts are required to uphold the validity of law unless those are shown to be *ultra vires*.

10. The Supreme Court's judgement in the matter of ***Venus Castings*** (*supra*) has been followed by the Supreme Court in the matter of ***Union of India vs. Supreme Steels & General Mills, 2001 (133) ELT 513 (SC)***.

11. The learned Counsel for the petitioners next contended that the Rules made under Section-3A, where those governed the Steel Mills or the Textile Mills, are *ultra vires* Section-3A of the Act because these Rules do not provide correct guidelines for determination of the capacity of the Textile Mills or the Steel Mills. Strong reliance was also placed on a single Bench judgement of the High Court of Madras in the matter of ***Beauty Dyes vs. Union of India, 2004 (166) E.L.T. 27 (Mad.)***. In the matter of ***Beauty Dyes*** (*supra*), Rule-3 of the Hot Air

Stenter Independent Textile Processors and Annual Capacity Determination Rules, 1998 were under challenge and the learned single Judge of the Madras High Court observed that Rule-3 of the Rules cannot be sustained as the same was *ultra vires* Section-3A of the Act. Taking the clue and cue from the said judgement, the learned Counsel submits that the Re-rolling Steel Rules, namely, Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1947 are *ultra vires* Section-3A because they do not provide correct procedure for determination of the annual capacity. Rule-3 of the Re-rolling Steel Rules reads as under :

> “3. The annual capacity of production referred to in rule 2 shall be determined in the following manner, namely :-
>
> (1) a hot re-rolling mill shall declare the values of `d', `n', `i' and `speed of rolling', the parameters referred to in sub-rule (3, to the Commissioner of Central Excise (hereinafter referred to as the Commissioner), with a copy to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise;
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> (2) on receipt of the information referred to in sub-rule (1), the Commissioner

shall take necessary action to verify their correctness and ascertain the correct value of each of the parameters. The Commissioner may, if he so desires, consult any technical authority for this purpose;

(3) the annual capacity of production of hot re-rolled products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula:-

Annual Capacity = 1.885 x 10 4 x d x n x i x e x w x Number of utilised hours (in metric tonnes)

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xxx xxx xxx xxx xxx xxx xxx xxx xxx”

12. According to Rule-2 of the said Rules, the rule shall apply to non-alloy steel hot re-rolled products falling under sub-heading Nos.7211.11, 7211.19, 7211.30, 7211.52, 7211.59, 7211.60, 7211.92, 7211.99, 7213.90, 7214.90, 7215.90, 7216.10 and 7216.90 of the Schedule to the Central Excise Tariff Act, 1985 for determining the

annual capacity of production of a factory if such goods are manufactured or produced with the aid of the hot re-rolling mill.

13. According to Rule-3, the capacity of production referred to in Rule-2 has to be determined in the manner as prescribed in Rule-3. The hot re-rolling mill is obliged to declare the values of `d', `n', `i' and `speed of rolling', the parameters referred to in sub-rule (3), to the Commissioner of Central Excise. On receipt of the information referred to in sub-rule (1), the Commissioner would take necessary action to verify the correctness of the information and shall ascertain the correct value of each of the parameters. If the Commissioner is doubtful about the correctness and authenticity of the information supplied, then, he may consult any technical authority for the said purpose. The annual capacity of production of hot re-rolled products of non alloy steel in respect of such factory shall be deemed to be as determined by applying the formula given below :

Annual capacity = $1.885 \times 10^{-4} \times d \times n \times i \times e \times w \times$ Number of utilised hours (in metric tons).

`d' denotes nominal centre distance of the pinions in the pinions stand in millimetres; `n' denotes nominal rotations per minute (RPM) of the drive; `i' denotes reduction ratio of the gear box or of the pulley system or combination thereof; and, `w' denotes weight in kilogramme per metre of the re-rolled product. The value of `e' in the formula is to be deemed to be 0.30 in case of low speed mills and 0.75 in case of high speed mills. The value of `w' factor in the formula for the high speed mills shall be deemed to be 0.45 and for the low speed mills shall be deemed to be as given in Rule-3. The Rule also provides as to which mill shall be a high speed mill and which shall be taken to be a low speed mill.

14. The learned Counsel for the petitioners submitted that the formula given in sub.rule-(3) of Rule-3 is not intelligible and it leaves scope for discrimination. According to him, the annual capacity cannot be decided in the air, but, it must be decided on the foundational facts. His submission is that Rule-3, specially, sub.rule-(3) of Rule-3, does not take into consideration various aspects relating to the production, specially, old mill and new mill, old machine and new machine, old technology and new technology and so. He submits that if the original capacity of a twenty years'

old machine was similar to a new machine, then, the annual capacity cannot be decided on the strength of the basic capacity of the said machine, but, still have to be decided after taking into consideration various factors such as age of the machine, the manner in which it is placed and at what rate, it is producing the goods.

15. When we asked the learned Counsel that if `n' denotes nominal rotations per minute of the drive, then, such rotations per minute in the new and old machine would be different and if the informations are to be supplied by the manufacturer himself, then, how the rule is not workable, the learned Counsel went on repeating that the formula is vague, the nominal rotations in old and new machines are different, therefore, the same would obviously affect the production. When we again asked the learned Counsel that if the facts and figures or the full details are to be supplied by the manufacturer himself and if the manufacturer knows that the old machine's production capacity is worn out or is reduced or is decreased by lapse of time, and such facts are found to be correct, then, obviously, the Commissioner would decide that the annual production capacity is low, then, how the petition would be occasioned and why the rule would not be workable, the learned Counsel said that he

does not have any answer to the question, but, he has instructions to say that the rule is not workable.

16. We are surprised to hear this argument. Challenge to the validity of the Act is not in the air, challenge to the Act can be made on foundational grounds. A rule can be challenged on the ground of non-workability or unworkability by producing relevant material before the Court. A challenge simply in the name of challenge, in howsoever high pitch it is, would not make the provisions of law *ultra vires*. It is also to be seen that after receiving the information from the concerned producer/manufacturer, the Commissioner has to take necessary action, verify the correctness and ascertain the correct value of each of the parameters. If he finds that the details supplied by the manufacturer/producers are correct, then, he would make necessary order and determine the annual capacity, but, in case he finds difficult to decide or finds that the annual capacity shown by the producer/manufacturer is something different than what is submitted by the manufacturer/producer, then, he can consult any technical authority for the purpose. The technical authority would only mean a person who knows the technical know-how in a particular subject. The technical authority if says that particular would be

the annual production capacity, then, obviously, nobody would be allowed to say something contrary to it unless it is shown that he has committed basic mistakes. If a technical expert comes to the conclusion that the capacity is particular one, then, the Commissioner if relies upon the said technical opinion, it cannot be said that the Commissioner was acting contrary to law. It is also to be seen that the formula provided in Sub.rule-(3) of Rule-3, *prima facie*, appears to be intelligible, it can only be challenged if something concrete is brought before the Court. The learned Counsel simply said that the formula is bad. We do not know that why the learned Counsel says so when he himself does not know and there is nothing in the petition to this effect. Even otherwise, Rule-3 of the said Rules, *prima facie,* does not appear to be *ultra vires* Section-3A.

17. So far as the judgement of the learned single Judge in the matter of ***Beauty Dyes*** (*supra*) is concerned, we are unable to agree with the reasonings given in the said judgement. The learned single Judge in the said matter has placed his reliance upon two Supreme Court's judgement, one was relating to levy of tax on the land and building, while the other one was dealing with the property tax on textile mills and factories. The said two

judgements have nothing to do with the production capacity. In paragraph-12 of the said judgement, the learned Judge has observed that the Government had not tried to fix the formula to determine the production capacity on the basis of the quantity of production, but, on the basis of the value fixed by the Central Government by themselves irrespective of the capacity of the factories concerned. The said observations, in our humble opinion, run contrary to Rule-3 of the Re-rolling Steel Rules, so also the Hot Air Stenter Rules. Section-3A read with the Rules are themselve a complete code when they provide that the annual production capacity can be determined on a particular formula and duty can be levied on the strength of the annual production capacity.

18. When somebody installs a machine or founds a factory, then, he knows that what is the capacity of his machines and what would be the annual production capacity. In a given case, the producer/manufacturer might exploit the machinery beyond their 100% capacity or for the reasons personal to the manufacturer/producer or because of other conditions, he may not be in a position to exploit the full strength of the machinery. It would always be for the manufacturer/producer to submit the correct facts, correct details and correct data, enabling

the Commissioner either himself or with the assistance of the technical expert to determine the annual capacity.

19. We could understand the argument of the learned Counsel if the matter ended on levy of production capacity and the duty was to be levied on the strength of the annual production capacity and nothing beyond that. Present is not a case where Section-3A ends with Sub.section-(2), Sub.section-(3) and Sub.Section-(4), in fact, are provisos to Sub.Section-(2) of Section-3A when they provide for redetermination of duty on proof of some facts.

20. In a given case, where for a period of seven days or more nothing can be produced or manufactured, then, pro-rata reduction would be available under Sub.section-(3) of Section-3A and in case, the manufacturer/producer manufactures/produces something less than the annual production capacity (as determined under Sub.section-(2) of Section-3A), then, he can always approach the Commissioner, convince him that his annual capacity though is much, but, he has produced some quantity less than his annual capacity and as such case, he is entitled to refund. If the section takes care of the rights of the producer/manufacturer by providing that

on less production/manufacture, he would be entitled to refund and the Supreme Court says that Section-3A is relatable to the production and not the capacity only, then, it would not be proper to say that Section-3A is *ultra vires* the Constitution. We would agree with the learned Counsel that excise can be levied on the production and/or manufacture and not otherwise, but, Section-3A cannot be held to be *ultra vires* the Constitution or the Central Excise Act itself, simply because it provides levy of excise on the annual production capacity, specially when it gives a right to the manufacturer/producer to claim refund on less production.

21. It was then contended that the order passed by the authority runs contrary to the judgement of the Supreme Court and Section-3A was omitted from the Statute Book on 11th May, 2001 and Rules 96(ZO), 96(ZP), 96(ZR) were repealed/withdrawn with effect from 1st March, 2001 and as there is no saving clause, no action can be taken either under Section-3A or under the said Rules.

22. So far as the second submission is concerned, there are no pleadings to that effect. When we pointed out this fact to the learned counsel, he submitted that

he has exchanged pleadings with the Counsel for the Central Government. We are astonished and we must say, we are amused by this submission. Exchange of pleadings or exchange of arguments between the two Counsel is on the other side and any decision by them would not bind the Court. The Court does not decide any question unless it is properly raised by way of pleadings and submissions at the time of arguments. It is trite that no arguments would be heard by the Court unless there are some pleadings to support the said arguments.

23. So far as the question of correctness of the order passed by the authority is concerned, we shall not enter into the same because by challenging the *vires* on flimsy ground, everybody would try to hold a sword against the Department, they would short-circuit the entire procedure and would straightway come to the Court. When the law provides for filing of the appeals, revisions or to approach to the Tribunal, then, the entire process cannot be short-circuited or bypassed by saying that as the *vires* of the Act is under challenge, therefore, the validity of the order should also be considered. In a given case, the right of appeal may be circumscribed by pre-deposit. If the High Court starts interfering in the merits of the order, riding on the

horse of the *vires*, then, nobody would ever go to the Tribunals or the Appellate Authority and the entire procedure provided for the appeals etc., would become nugatory. We refuse to interfere at the request of the learned Counsel and refrain ourselves from considering the correctness/legality/validity of the order impugned.

24. The learned Counsel for the petitioners submitted, placing reliance upon the judgement of the High Court of Madras in the matter of ***Beauty Dyes*** (*supra*) that the rules relating to the textile mills are identical/*pari materia* to the Rules of Re-rolling.

25. In the matter of ***R.K.Garg vs. Union of India, & Ors., (1981) 4 S.C.C. 675***, the Supreme Court has observed that:

> "... laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes. J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straight jacket formula and this is particularly true in case of legislation

dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The Court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved.

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The Court must always remember that, `legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; `that exact wisdom and nice adaption of remedy are not always possible' and that `judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call *trial and error method* and therefore it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The Court cannot, as pointed out by the United States Supreme Court in *Secretary of Agriculture v. Central Roig*

> *Refining Co., (1950) 94 L Ed 381*, be converted into tribunals for relief from such crudities and inequities. .... If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues."

The learned Counsel for the petitioners submitted that the Commissioner may decide the annual production capacity on the material available with him and the same may lead to illegality. In our considered opinion, the petitioner would be the person, who knows everything, including ins and outs of his machines and his factory/industry. If he provides the facts correctly, then, he is not likely to face any difficulty, but, if he provides incorrect facts and determination is required to be made with the help and assistance of the technical experts, then too, the petitioner is not likely to suffer because a technical expert would examine everything technically and would determine the annual production capacity.

26. Before parting with the case, we must observe that despite observations made by the Supreme Court in

the matter of ***Venus Castings*** (*supra*) and our reading of the passage from the said judgement to the learned Counsel for the petitioners, he went on repeating that the correctness and validity of Section-3A has not at all been considered by the Supreme Court. We record our displeasure on that part. The Supreme Court, as observed by us in the earlier paragraph, has pointedly observed that Section-3A relates to or is relatable to the production or manufacture and not to the annual production capacity.

27. Each of the petitions is dismissed with costs of Rs.10,000/- in each case. Rule is discharged.

28. At this stage, the learned Counsel for the petitioners submits that the petitioners be given some time to approach the appropriate Appellate Forum, enabling them to challenge the correctness, validity and propriety of the order impugned. We would leave the petitioners with the liberty to approach the concerned Appellate Forum with an application for condonation of delay and exclusion of time spent in these proceedings. If such application is made by the petitioners, then, the same would be decided by the Appellate Forum in accordance with law.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

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